

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of:)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	DA 04-3185, 3186, 3187
)	

COMMENTS OF INFOCISION MANAGEMENT CORPORATION

I. INTRODUCTION

InfoCision Management Corporation (IMC), is a leading teleservices company that specializes in nonprofit fundraising, direct to consumer and business-to-business applications. IMC provides sales and customer support, fundraising and public education services to many national charities and Fortune 1000 corporations.

IMC fully supports the FCC's previous comments and actions that differing state law should be preempted with regard to application to interstate telephone calls.

One scheme of regulation is best for consumers, businesses and regulators as it is the least confusing, least expensive and most likely to protect important interests.

IMC has spent hundreds of thousands of dollars complying with the duplicative effect of varying state and federal laws. As the federal regulator of the interstate telephone network, the FCC should take this opportunity to simplify the regulatory environment while still protecting residential privacy.

IMC raises more money for nonprofit organizations than any other outbound telephone marketing company in the world. We also have an unmatched reputation for quality, integrity and customer service. IMC's mission is to be the highest quality teleservices provider of the 21st Century.

As set forth below, IMC believes that the FCC has an unprecedented opportunity to coordinate federal telemarketing list provisions to further consumer privacy, respect free speech and avoid duplicative and burdensome requirements on legitimate business. The national regulatory scheme should eliminate duplication and inconsistencies between the FCC, FTC and state regulatory schemes.

FCC action preempting state laws as applied to interstate telephone calls would confirm earlier FCC action on this subject, reduce consumer confusion regarding varying requirements, and eliminate needless expense. All three of these benefits would be achieved with no loss of consumer rights or protection as states, private citizens and federal regulators can enforce the federal rules.

These comments are aimed at supporting FCC action in the best interests of consumers, businesses and regulators.

II. COMMENTS

The FCC should take advantage of this opportunity to reaffirm its previous opinions that states do not have jurisdiction over interstate calls, and those of Congress, that a uniform federal scheme of regulation of interstate telemarketing calls best protects consumers and businesses.

The TCPA and the FTC's Telemarketing Sales Rule establish a comprehensive scheme of regulation for telemarketing enforceable by federal and state regulators and private consumers. Differing state laws needlessly confuse consumers and businesses and impose needless expenses on businesses like IMC.

A. DA 04-3186: The FCC should clarify its exclusive jurisdiction over interstate telephone calls by explicitly preempting state law with regard to state do-not-call lists.

The most duplicative burden facing IMC and other legitimate nationwide businesses is compliance with the multitude of conflicting and inconsistent state "do-not-call" lists with application sometimes in direct conflict with federal law. IMC urges the FCC to take the national scope of its regulatory authority seriously and preempt state law with regard to application to interstate telephone calls.

1. Preemption is required by the terms of the TCPA, the legislative history and prior opinions of the FCC.

Congress was clear when it passed the TCPA. Federal law was needed because states did not have jurisdiction over interstate calls.

The preemption clause of the TCPA has often been cited but is seldom correctly limited to intrastate calls. Specifically, the TCPA reads:

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

47 U.S.C. §227(e).

This section is written to allow States to regulate intrastate calls

However, it is clear from the legislative history of the TCPA that Congress intended the TCPA and the Communications Act of 1934 to preempt state laws as applied to interstate telephone calls.

The FCC has responded to consumer inquiries concerning preemption and stated unequivocally that it is the FCC's position that the TCPA preempts state regulation of interstate calls with regard to recorded messages. Specifically, a March 3, 1998 letter from Geraldine A. Matisse, Chief, Network Services Division, to Mr. Sanford L. Schenberg states that: "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and Commission Regulations, enacted pursuant to the TCPA, govern interstate commercial telemarketing calls in the United States." Similarly, a January 26, 1998 letter from Ms. Matisse to Delegate Ronald A. Guns of the Maryland House of Delegates specifically addressed the delivery of recordings by telephone and states that: "In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state." The definition of "interstate communication" is clearly defined in the Telecommunications Act of 1934 as "any communication from any state to any state." 47 U.S.C. § 153(22). The Guns and Schenberg letters are appended hereto for your convenience.

The Commission was also clear in its rulemaking amending the TCPA regulations in 2003. It provided an 18-month period for states to "harmonize" their lists with the federal do not call list. Report and Order, July 3, 2003, ¶77. More restrictive state laws applicable to interstate calls "almost certainly conflict with [the TCPA regulations]." Id. at ¶82. The FCC recognized the businesses should not be subject to multiple, conflicting legislative schemes. Id. at ¶83.

These facts led the Commission to the conclusion that "state regulation of interstate telemarketing calls that differ from our rules certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." Id. at ¶84.

The legislative history to the TCPA shows that Congress intended the FCC to have exclusive jurisdiction over interstate calls. "Over forty states have enacted legislation limiting the use of ADRMPs or otherwise restricting unsolicited telemarketing. These measures have had limited affect, however because states do not have jurisdiction over interstate calls." Legislative History, S. Rep. No.102-178, p. 3. Further, Senate Report 102-177 repeats the claim under "the need for legislation" that:

As a result, over 40 States have enacted legislation limiting the use of automatic dialers or otherwise restricting unsolicited telemarketing. These measures have had limited effect however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telephone calls to supplement their restrictions on intrastate calls.

102 Senate Report 177 (page 3) (emphasis added).

Next, the comments of Senator Hollings concerning the law are set forth in the Congressional Record at 137 Cong. Rec. S. 18781 as:

Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject of §227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.

Id. at page 10 (emphasis added).

The FCC should clarify the language of the TCPA by ruling, in accordance with these two opinion letters and the legislative history, that the TCPA precludes states from regulation interstate commercial telemarketing calls.

2. Florida's do-not-call list, as well as other state lists, are duplicative, wasteful and frustrate the intent of Congress with regard to interstate telephone calls.

Florida Statute Section 501.509 implements a state do-not-call list similar to, but not identical to, the federal No Call list.

Florida law, for example, contains a content-based exemption from its restrictions for calls “by a newspaper published or his or her agent or employee in connection with his or her business.” Fl. Stat. §501.059(1)(c)(4). This content-based exemption calls the constitutionality of the list itself into question.

Florida also charges its citizens a fee to add their name to the state list. Id. at (3)(a).

Florida charges IMC an annual fee of \$400 to access the list.

Many other states have their own do-not-call lists imposing additional fees on IMC and other businesses ranging up to \$20,000 per year (Wisconsin charges \$700 for its list plus \$75 per telephone line used by the business capped at \$20,000 per business per year.) The following chart sets forth these fees and total costs of the duplicative state scheme.

STATE	FEDERAL	STATE	BONDS
Alabama	Federal Fee Applies		
Alaska	Federal Fee Applies	\$31 Anchorage \$50 Fairbanks \$50 Juneau \$50Kenai \$50 Kodiak \$50 North Pole \$50 Sitka	

Arizona	Federal Fee Applies		
Arkansas	Federal Fee Applies		
California	Federal Fee Applies		
Colorado		\$500	
Connecticut	Federal Fee Applies		
Florida		\$100 Quarterly Statewide Listing (\$400 Annually) \$30 Quarterly Per Specific Area Code	
Georgia	Federal Fee Applies		
Idaho	Federal Fee Applies		
Illinois	Federal Fee Applies		
Indiana		\$750 Annually	
Kansas	Federal Fee Applies		
Kentucky	No Fee	No Fee	
Louisiana		\$800 Annually(Per Principal Solicitor) \$400 (Fee to Obtain List) \$1,200 (# of Dependent Solicitors)	\$50,000
Maine		\$465 (DMA)	
Massachusetts		\$1,100 Annually	
Michigan	Federal Fee Applies		
Minnesota	Federal Fee Applies		
Mississippi		\$800 Annually Via Internet \$1,000 Annually Paper Copy	\$50,000
Missouri		\$150 Quarterly (\$600 Annually)	
Montana	Federal Fee Applies		
Nevada	Federal Fee Applies		
New Hampshire	Federal Fee Applies		
New Jersey	Federal Fee Applies		
New Mexico	Federal Fee Applies		
New York	Federal Fee Applies		
North Carolina	Federal Fee Applies		
North Dakota	Federal Fee Applies		
Ohio	Federal Fee Applies		
Oklahoma		\$150 Quarterly or \$600 Annually	
Oregon	Federal Fee Applies		
Pennsylvania			
South Dakota	Federal Fee Applies	\$500	
Tennessee		\$500 Annually	
Texas		\$45 Quarterly (\$180 Annually)	
Utah	Federal Fee Applies		

Vermont	Federal Fee Applies		
Virginia	Federal Fee Applies		
Wisconsin		\$700 First Year \$500 Subsequent Years \$75 per phone line *Fees capped at \$20,000 *Fees could vary depending on additional copies, etc.	
Wyoming			
Total:	Federal \$11,000.00	State Fees \$27,526.00	Bonds \$100,000.00

The Florida list, then, differs from and is less restrictive than the federal list, imposes needless expense on consumers, IMC and other businesses, and is likely unconstitutional.

Businesses, regulators and consumers would be served by preemption of this law in accordance with the intent of Congress.

B. DA 04-3185: The FCC should confirm that the definitions used in the TCPA are the sole applicable definitions relevant to interstate telephone calls and limit the jurisdiction of state laws to intrastate calls.

1. The Commission should preempt state application of varying definitions of “established business relationship” to interstate calls.

New Jersey is one of more than thirty states which have adopted its own definition of “established business relationship” other than the federal standard adopted by the FCC and the FTC (3 month/18 month standard found at 47 CFR §64.1200(f)(3) and 16 CFR §310.2(n).)

This chart sets forth those varying state definitions as well as states which do not provide for an exemption for calls to consumers with whom the business has an established business relationship.

State	<i>Relevant Statutory Language and Citation</i>
Alabama	Prior or existing business relationships. <i>Al. Code § 8-19A-3(19). (This term is not further defined).</i>
Alaska	<i>When “a person soliciting business from prospective purchasers who have, within the last <u>24 months</u>, purchased from the person making the solicitation or from the business enterprise for which the person is calling but only if the person or business enterprise has not received a written request from the prospective purchaser asking that telephone solicitations cease.”</i> Alaska Code § 45.50.475(g)(3)(B)(v).
Arkansas	“A relationship in which some financial transaction has transpired between the consumer and the telephone solicitor or its affiliates within the <u>thirty-six (36) months</u> immediately preceding the

	<p>contemplated telephone solicitation.</p> <p><i>The term does not include the situation wherein the consumer has merely been subject to a telephone solicitation by or at the behest of the telephone solicitor or its affiliates within the thirty-six (36) months immediately preceding the contemplated telephone solicitation.</i>” Ark. Code § 4-99-403 (5).</p>
California	<p><i>“A relationship between a seller and a subscriber based on the subscriber’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and seller, within the <u>18 months</u> immediately preceding the date of the telemarketing call.”</i> Cal. Bus. & Prof. Code § 17592(e)(4).</p>
Colorado	<p><i>“A relationship that: (i) was formed prior to the telephone solicitation, through a voluntary, two-way communication between a seller or telephone solicitor and a residential subscriber, with or without consideration, on the basis of an application, purchase, ongoing contractual agreement, or commercial transaction between the parties regarding products or services offered by such seller or telephone solicitor; and (ii) has not been previously terminated by either party; and (iii) currently exists or has existed or has existed within the immediately preceding <u>(18) eighteen months.</u>”</i></p> <p><i>“With respect to a financial institution or affiliate, as those terms are defined in section 527 of the federal Gramm-Leach-Bliley Act of 1999, includes any situation in which a financial institution or affiliate makes solicitation calls related to other financial services offered, if the financial institution or affiliate is subject to the requirements regarding privacy of Title V of the federal Gramm-Leach-Bliley Act of 1999, and the financial institution or affiliate regularly conducts business in Colorado.”</i></p> <p>C.R.S. 6-1-903(7).</p> <p>C.R.S. 6-1-903(10)(b)(III).</p>
Connecticut	<p><i>“To an existing customer, unless such customer has stated to the telephone solicitor that such customer no longer wishes to receive the telephonic sales calls of such telephonic solicitor.” Conn. Gen. Stat. § 42-288a(9)(c). (This term is not further defined).</i></p>
Florida	<p><i>Prior or existing business relationship.</i> Fla. Stat. § 501.059(1)(c)(3). (This term is not further defined).</p>
Georgia	<p><i>Prior or current business relationship.</i> Ga. Code § 46-5-27(b)(3)(B). (This term is not further defined).</p>

Idaho	<i>"A relationship that was formed, prior to a telephone solicitation, through a voluntary, two-way communication between a seller or telephone solicitor and a residential subscriber, with or without consideration, on the basis of an application, purchase, ongoing contractual agreement, or commercial transaction between the parties regarding products or services offered by such seller or telephone solicitor; has not been terminated by either party; and currently exists or has existed within the immediately preceding eighteen (18) months." 2004 ID H.B. 535 § 1.</i>
Illinois	<p><i>"Existence of an oral or written transaction, agreement or other legal state of affairs involving a person or entity and an existing customer under which both parties have a course of conduct or established pattern of activity for commercial or mercantile purposes and for the benefit of profit for both parties. A pattern of activity does not necessarily mean multiple previous contacts. The relationship must exist between the existing customer and the person or entity directly, and does not extend to any related business entity or other business organization of the person or entity or related to the person or entity or the person or entity's agent including but not limited to a parent corporation, subsidiary partnership, company, or other corporation or affiliate." 815 ILCS 402/5(b).</i></p> <p><i>"Existing customer means an individual who has either entered into a transaction, agreement, contract, or other legal state of affairs between a person or entity and a residential subscriber under which the payment or exchange of consideration for any goods or services has taken place within the preceding <u>18 months</u> or has been arranged to take place at a future time or opened or maintained a debit account, credit card account, or other credit or discount program offered by or in conjunction with the person or entity and has not requested the person or entity to close such account or terminate such program." 14 Ill. Admin. Code § 300.20.</i></p>
Indiana	<i>No exemption. Calls regarding a transaction not yet completed are exempt, only. Ind. Code §24-4.7-1-1</i>
Kansas	<i>"A prior or existing business relationship formed by a voluntary two-way communication between a person or entity and consumer with or without an exchange of consideration, on a basis of an application, purchase or transaction by the consumer, within the preceding <u>36 months</u>, regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." K.S.A. § 50-670(a)(6).</i>
Kentucky	<p><i>A prior or existing business relationship includes, but is not limited to "the solicitation of contracts for the maintenance or repair or items previously purchased from the person making the solicitation or on whose behalf the solicitation is made." K.R.S. § 367.46951(2)(c).</i></p> <p>The following factors will also be taken into consideration in determining the existence of a prior or existing business relationship:</p> <ol style="list-style-type: none"> <i>1. Whether the relationship was formed prior to the telephone solicitation, by a voluntary two-way communication between</i>

	<p><i>the telemarketer or merchant and the consumer;</i></p> <ol style="list-style-type: none"> 2. <i>Whether the relationship involves commercial or mercantile activity, including goods or services;</i> 3. <i>Whether the relationship involves a mutual exchange of consideration;</i> 4. <i>Whether the relationship has been previously terminated by either party, including the consumer's termination of the relationship by informing the telemarketer or merchant; and</i> 5. <i>Whether a reasonable consumer would expect the business relationship to extend to related business entities or organizations of the telemarketer or merchant, including parent or subsidiary corporations, partnerships, or affiliates.</i> <p>40 K.A.R. 2: 076E(2).</p>
Louisiana	<p>"To any person with whom the telephonic solicitor has an existing business relationship, or a prior business relationship that was terminated or lapsed within <u>(6) six months</u> of such call." <i>La. Rev. Stat. 45:844.12(4)(c).</i></p>
Maine	<p><i>Established business relationship ... at the time the call is made.</i> 32 Me. Code § 14716 (This term is not further defined).</p>
Massachusetts	<p>An "existing customer" is "a residential telephone subscriber with whom the person or entity making a telephonic sales call has maintained an account or had a business relationship within the previous <u>24 months</u>." <i>Mass. Gen. Laws, Ch. 159C, § 1.</i></p>
Michigan	<p><i>An "existing customer" is "an individual who has purchased goods or services from a person, who is the recipient of a voice communication from that person, and who either paid for the goods or services within the <u>12 months</u> preceding the voice communication or has not paid for the goods and services at the time of the voice communication because of a prior agreement between the person and the individual."</i> Mich. Comp. Laws § 445.111(j).</p>
Minnesota	<p><i>Prior or current business relationship.</i> Minn. Stat. § 325E.311 (6)(2) (This term is not further defined).</p>
Mississippi	<p><i>"Established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a consumer, with or without an exchange of consideration, on the basis of any inquiry, application, purchase or transaction by the consumer, which relationship is currently existing or was terminated within <u>(6) six months</u> of the telephone solicitation.</i></p> <p><i>However, the act of purchasing consumer goods or services under an extension of credit does not create an existing business relationship between the consumer and the entity extending credit to the consumer for such purchase. The term does not include the situation wherein the consumer has merely been subject to a telephone solicitation by or at the behest of the telephone solicitor within the six (6) months immediately preceding the contemplated telephone solicitation."</i> Miss. Code § 77-7-705(h).</p>
Missouri	<p><i>"By or on behalf of any person or entity with whom a residential subscriber has had a business contact within the past <u>one hundred</u></i></p>

	<i>eighty (180) days or a current business or personal relationship.” R.S. Mo. § 407.1095(3)(b).</i>
Montana	“By or on behalf of any person or entity with whom a residential subscriber has had a business contact within the past <u>180 days</u> or has a current business or personal relationship.” <i>Mont. Code 30-14-1601(4)(b).</i>
Nevada	<p>“A telephone call is deemed to have been solicited if it is made to a person who ... had an established business relationship with the caller, if the call is made solely to verify the termination of the business relationship.” <i>Nev. Stat. § 228.530(3)(b).</i></p> <p><i>“The provisions of Section 14 of this Act do not prohibit a telephone solicitor from making or causing another person to make an unsolicited telephone call for the sale of goods or services to a telephone number in the currently effective version of the list of telephone numbers in the currently effective version of the list of telephone numbers in the registry if there is a preexisting business relationship between the telephone solicitor and the person who is called.”</i></p> <p>*Telephone solicitors must maintain an internal do-not-call list and provide written annual notification of the option to be placed on this list to customers with whom there is a pre-existing business relationship. <i>Nev. Stat. § 228.600(1).</i></p> <p><i>"Preexisting business relationship means a relationship between a telephone solicitor and a person that is based on (A) the person's purchase, rental or lease of goods or services directly from the telephone solicitor, but not from any affiliate or associate of the telephone solicitor; or (B) any other financial transaction directly between the person and the telephone solicitor, but not between the person and any affiliate or associate of the of the telephone solicitor, that occurs within the 18 months immediately preceding the date of the unsolicited telephone call for the sale of goods or services.” Id. at (4).</i></p>
New Hampshire	“A relationship between a seller and a consumer based on: (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of the telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.” <i>N.H. Code § 359-E:7(V).</i>
New Jersey	<p>1. Calls to “established customers” whose names are on the “do-not-call” list are allowed, as long as the call relates to existing services, but not if the call is for an upgrade or cross sell. <i>N.J. Reg. 13:45D-4.4.</i></p> <p>“Established customers” are customers who have purchased from you in the past and have not affirmatively cancelled the relationship. <i>N.J. Reg. 13:45D-1.3</i></p> <p>2. Calls to “existing customers” whose names are on the “do-not-call”</p>

	<p>list are allowed as long as the caller maintains an internal “do-not-call” list.</p> <p>“Existing customers” are customers who are obligated to make payments to a seller or who have entered into a written contract with a seller. <i>N.J. Reg. 13:45D-1.1</i></p> <p>“Existing customers” also include customers with whom a seller’s sole obligation is the extension of credit which is made within 18 months of the date of the customer’s last credit transaction or until the satisfaction of the credit obligation, whichever is later.” <i>N.J. Reg. 13:45D-4.2</i></p>
New Mexico	<p>“Established business relationship means a relationship that was formed, prior to a telephone solicitation, through a voluntary, two-way communication between a seller or telephone solicitor and a residential subscriber, with or without consideration, on the basis of an application, purchase, ongoing contractual agreement or commercial transaction between the parties regarding products or services offered by the seller or telephone solicitor and currently exists or has existed within the immediately preceding <u>twelve (12) months</u>.” <i>N.M. Stat. § 57-12-22(D)(1)</i></p>
New York	<p>“Established business relationship shall mean the existence of an oral or written arrangement, agreement, contract, or other such legal state of affairs between the telemarketer and an existing customer where both parties have a course of conduct or established pattern of activity for commercial or mercantile purposes and for the benefit of both parties. A pattern of activity does not necessarily mean multiple previous contacts. The ‘established business relationship’ must exist between the existing customer and the telemarketer directly, and does not extend to any related business entity or other business organization of the telemarketer or related to the telemarketer or the telemarketer’s agent including, but not limited to, a parent corporation, subsidiary partnership, company, or other corporation or affiliate.” <i>21 NYCRR § 4603.2(b)</i>.</p> <p>“Existing customer shall mean an individual who has entered into an arrangement, agreement, contract or other such legal state of affairs between the telemarketer and the consumer where the payment or exchange of consideration for any goods or services has taken place within the preceding <u>18 months</u>, or has been previously arranged to take place at a future time.” <i>21 NYCRR§ 4603.2(c)</i>.</p>
North Carolina	<p>“A relationship between a seller and a consumer based on: A) the consumer’s purchase, rental or lease of the seller’s goods or services or a financial transaction between the consumer and the seller or one or more of its affiliates within the <u>18 months</u> immediately preceding the date of a telephone solicitation; or B) the consumer’s inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of a telephone solicitation.” <i>N.C. Gen. Stat. § 75-101(5)</i></p>
North Dakota	<p>“Established business relationship means a relationship between a</p>

	seller and a consumer based on a free trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller within the <u>twenty-four months</u> immediately preceding the date of a telemarketing call. <i>N.D. Code § 51-28-01(4).</i>
Oklahoma	<i>"A prior relationship formed within the preceding twenty-four (24) months or an existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."</i> 15 Ok. St. 775B.2(3).
Oregon	<i>"Telephone solicitation" does not include "a person soliciting business from prospective purchasers who have previously purchased from: (A) the person making the solicitation; (B) the business enterprise for which the person is calling; or (C) a predecessor of the business enterprise for which the person is calling."</i> O.R.S. § 646.569(2)(b).
Pennsylvania	<i>"A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential telephone subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by such persons or entity (within the last <u>12 months</u>). In regard to an inquiry, the person or entity shall obtain the consent of a residential telephone subscriber to continue the business relationship beyond the initial inquiry."</i> 73 P.S. § 2242
South Dakota	<i>"Unsolicited telephone call" does not a call made "to any person with whom the telephone solicitor, or any business or financial institution on whose behalf the telephone call is being made has an established business relationship or a business relationship that existed within the immediately preceding <u>twelve (12) months</u>."</i> S.D. Stat. § 49-31-1(32)(c).
Tennessee	<i>"An 'existing customer' includes a residential subscriber with whom the person or entity making a telephone solicitation has had a prior relationship within the prior <u>twelve (12) months</u>."</i> Tenn. Code Ann. § 64-4-401(6)(B)(iii).
Texas	<i>"A prior or existing relationship of a person formed by a voluntary two-way communication between a person and a consumer regardless of whether consideration is exchanged, regarding consumer goods or services offered by the person, that has not been terminated by either party."</i> Tex. Bus. & Com. Code § 43.002(4); 16 TAC 26.37(c)(2). <i>"A business relationship that has been terminated by either party, if the call is made before the later of (i) the date of publication of the first Texas no-call list on which the no-call registrant's telephone number appears; or, (ii) one year after the date of termination."</i> 16 TAC 26.37(c)(2).
Utah	<i>"Established business relationship" means a relationship that:</i>

	<p>(I) is based on inquiry, application, purchase or transaction regarding products or services offered;</p> <p>(II) is formed by a voluntary two-way communication between a person making a telephone solicitation and a person to whom a telephone solicitation is made; and</p> <p>(III) has not been terminated by:</p> <p>(A) an act of either party; or</p> <p>(B) the passage of 18 months since the most recent inquiry, application, purchase, transaction, or voluntary two-way communication.</p> <p>Utah Code 13-25a-102(4)</p>
Vermont	Established business relationship. 9 V.S.A. 2464a(a)(7)(B)(iv). (This term is not further defined).
Virginia	"A relationship between the called person and the person on whose behalf the telephone solicitation call is being made based on: (i) the called person's purchase from, or transaction with, the person on whose behalf the telephone solicitation call is being made within the 18 months immediately preceding the date of the call or (ii) the called person's inquiry or application regarding any property, good, or service offered by the person on whose behalf the telephone solicitation call is being made within the three months immediately preceding the date of the call." Va. Code § 59.1510.
Wisconsin	<p>"The telephone solicitation is made to a recipient who is a current client of the person selling the property, goods, or services that is the reason for the telephone solicitation. This paragraph does not apply if the recipient is a current client of an affiliate of such a person, but is not a current client of such a person." Wis. Stat. § 100.52(6)(b).</p> <p>"Client" means "a person who has a current agreement to receive, from the telephone caller or the person on whose behalf the call is made, property, goods, or services of the type promoted by the telephone call." ATCP § 127.80 (2).</p>
Wyoming	"A prior or existing relationship formed by a voluntary two-way communication between a seller or telephone solicitor and a consumer with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the consumer regarding products or services offered by such seller or telephone solicitor which relationship has not been previously terminated by either party." Wyoming Code § 40-12-301(a)(vi).

New Jersey's definition of "established business relationship" is perhaps the most confusing of these state laws. It does not serve the interests of consumers or national businesses for state lists to adopt these varying laws and apply them to interstate calls.

The TCPA clearly provides consumers who do not want calls from a business with which they have a relationship- i.e. request to be placed on that business's internal do-not-call list. 47 CFR §64.1200(d).

The Commission should preempt New Jersey's law, and the other state laws using different

“established business relationship” exemptions.

2. The Commission should preempt varying state calling curfews from application to interstate calls.

As set forth above, the FCC should preempt conflicting state law with regard to application to interstate telephone calls. One area of this application would enhance consumer privacy by allowing a uniform calling window for IMC’s business, i.e., 8 a.m. to 9 p.m. local time of the person called. 47 CFR §64.1200(e)(1).

At the time of this comment, more than 13 states have laws which contribute to consumer confusion by setting a differing curfew.

<u>Jurisdiction</u>	<u>Calling Time Restrictions</u> (Local Time at the Called Person=s Location)	<u>Statutory Citation</u>
Alabama	8:00 AM to 8:00 PM (Monday through Saturday); Calls prohibited on Sunday and on holidays.	Al. Pub. Serv. Comm=n Rule T-17(B)(2)
Connecticut	9:00 AM to 9:00 PM	CT Statutes ' 42-288a(c)
Kentucky	10:00 AM to 9:00 PM	KY Stat. ' 367.46955 (16)
Louisiana	8:00 AM to 8:00 PM (Monday through Saturday); Calls prohibited on Sunday and state holidays.*	La. R.S. ' 45:811(2) Gen. Order R-27021
Massachusetts	8:00 AM to 8:00 PM	Mass. Gen. Laws Ch. 159C(3)(ii)
Michigan	9:00 AM to 9:00 PM	MI Stat. ' 750.540E(f)
Minnesota	9:00 AM to 9:00 PM	MN Stat. ' 325E.30
Mississippi	8:00 AM to 8:00 PM (Monday through Saturday); Calls prohibited on Sunday.	MS Stat. ' 77-3-603(a)
Nevada	9:00 AM to 8:00 PM (Effective Jan.1, 2004)	Nev. A.B. 232 § 2
New Mexico	9:00 AM to 9:00 PM	NM Stat. ' 57-12-22 (B)(4)
Rhode Island	9:00 AM to 6:00 PM (Monday through Friday); 10:00 AM to 5:00 PM (Saturday); Calls prohibited on Sunday and state and federal holidays.*	RI Statutes ' 5-61-2 5-61-3.6
South Dakota	9:00 AM to 9:00 PM (Monday through Saturday); Calls prohibited on Sunday.	SD Stat. ' 37-30A-3(2)
Texas	9:00 AM to 9:00 PM (Monday through	TX Bus. & Com. Code

	Saturday); 12:00 Noon to 9:00 PM (Sunday)	' 37.02(a)(2)
Wyoming	8:00 AM to 8:00 PM	2003 Wy. H.B. 53

It is again in the interests on consumers and businesses for the FCC to require a uniform standard with regard to this restriction.

3. The Commission should preempt state lists with purport to apply to charity's fundraising calls from application to interstate calls.

Finally, several states' laws differ from the federal standard with regard to restrictions on fundraising by charities or political candidates.

This chart sets forth those state laws which purport to apply their state do-not-call lists to charitable fundraising calls.

Jurisdiction	Does State DNC List Purport to Apply to Charity calls By IMC	Citation
Alabama	No	§ 8-19A-4; Regs. T-31
Alaska	Yes	§ 45.50.475
Arkansas	Yes	§ 4-99-406
California	No	Bus. & Prof. § 17592
Colorado	No	§ 6-1-901
Connecticut	No	§ 42-288a
Florida	No	§ 501.059
Georgia	No	§ 46-5-27
Idaho	No	§ 48-1001
Illinois	No	815 ILCS § 402/5(e)(4)
Indiana	Yes	§ 24-4.7-1
Kansas	No	§ 50-670
Kentucky	No	§ 367.46951
Louisiana	Yes	§ 844.12(4)
Maine	No	32 § 14716
Massachusetts	No	ch. 159C § 1
Michigan	No	§ 445.111e
Minnesota	No	§ 325E.311(6)(3)
Mississippi	No	§ 77-3-711(f)
Missouri	No	§ 407.1095
Montana	No	30-14-1601(4)(c)
Nevada	Yes	§ 228.530(1)
New Hampshire	No	§ 359-E:7(IX)(c)
New Jersey	No	56:8-120
New Mexico	No	§ 57-12A-2

New York	No	26 Bus. § 399-z(3); §4602.6(d)—Reg.
North Carolina	No	75-103
North Dakota	Yes	§ 51-28-01(7)
Oklahoma	No	15 Okl. St. § 775B.2(1)
Oregon	Yes	§ 646.567
Pennsylvania	No	73 P.S. § 2242
South Dakota	No	§ 49-31-1 (31)
Tennessee	Yes	§ 65-4-401
Texas	No	Tex. Bus. & Com. Code § 43.003
Utah	No.	§ 13-25a-111(3).
Vermont	No	9 V.S.A. § 2464a(a)(7)(B)(ii)
Wisconsin	No	§ 100.52(1)(j)
Wyoming	No	§ 40-12-302(b)

The FCC has been clear in the past that calls by IMC or other businesses on behalf of tax-exempt nonprofits are not subject to rules governing telephone solicitations. Report and Order, July 3, 2003, ¶125-128. Such application raises serious constitutional questions regarding these state lists (see e.g. FOP v. Stenehjem, 287 F. Supp. 2d 1023 (D. N.D., SE Div., 2003) and is contrary to the intent of Congress that telemarketing restrictions apply solely to sales of goods or services by commercial entities.

The FCC should reaffirm this opinion, and protect it from erosion by differing state laws, by preempting these state laws with regard to application to interstate telephone calls.

III. CONCLUSION

IMC has always structured its activities to honor the privacy requests of individuals. It complies with the federal do-not-call list and laws. Consumers, however, are not served, and indeed are harmed, by separate state lists, with varying exemptions and applicability. IMC urges the FCC to confirm its previous statements that state lists, and varying state laws are limited in application to intrastate calls. As state regulators can enforce these federal standards, they remain able to protect there citizens in applying this uniform standard.

Steve Brubaker
Senior Vice President of Corporate Affairs

11/05/04

Attachments

Federal Communications Commission
Washington, D.C. 20554

January 26, 1998

Delegate Ronald A. Guns
House of Delegates
161 Lowe Office Building
Annapolis, Maryland 21401-1991

Dear Mr. Guns:

I am writing in response to your August 1, 1997, letter to Regina Keeney, former Chief, Common Carrier Bureau, requesting that the Commission clarify whether the State of Maryland may enact laws that would apply to all commercial telemarketing calls received within the State, only to those calls that originate within the State or only to wholly intrastate calls. You asked whether the Commission had considered adopting rules that would require telemarketers utilizing automated dialing systems to be on the telephone line and ready to respond to call recipients at the time the subscriber answers. Lastly, you asked whether the Commission has considered adopting a rule that would require telemarketers to inform all call recipients that they had the option to be placed on a do-not-call list.

On December 20, 1991, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243, which amended the Communications Act of 1934¹ by adding a new section 47 U.S.C. § 227. The TCPA mandated that the Commission implement regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising. On September 17, 1992, the Commission adopted a *Report and Order* (CC Docket 92-90, FCC No. 92-443),² which established rules governing unwanted telephone solicitations and regulated the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

"Whether a state may impose requirements on interstate communications depends on an analysis under the Supremacy Clause of Article VI of the U.S. Constitution."³ Under the

¹ 47 U.S.C. §§ 151 *et seq.* ("Communications Act" or "the Act").

² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd 8752 (1992) (*Report and Order*).

³ *Operator Services Providers of America Petition for Expedited Declaratory Ruling, Memorandum Opinion and Order*, 6 FCC Rcd 4475, 4476 (1991) (*Operator Services Memorandum Opinion and Order*).

Supremacy Clause, a state may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.^d "The key inquiry is whether Congress intended to supplant state laws on the same subject."^e Section 2(a)^f of the Act grants the Commission jurisdiction over all interstate and foreign communications. Interstate communications are defined as communications or transmissions between points in different states.^g Section 2(b)(1)^h of the Act generally reserves to the states jurisdiction over intrastate communications.ⁱ Intrastate communications are defined as communications or transmissions between points within a state.^j

The Communications Act, specifically section 227 of the Act, establishes Congress' intent to provide for regulation exclusively by the Commission of the use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or prerecorded messages. The TCPA also preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages.^k By its terms, the TCPA shall not "preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."^l

In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland can not apply its statutes to calls that are received in Maryland and originate in another state or calls that

^d *Id.*

^e *Id.*

^f 47 U.S.C. § 152(a).

^g 47 U.S.C. § 153(22).

^h 47 U.S.C. § 152(b)(1).

ⁱ *Operator Services Memorandum Opinion and Order*, 6 FCC Rcd at 4476.

^j Intrastate means remaining entirely within the boundaries of a single state. NEWTON'S TELECOM DICTIONARY, 11th Edition, at 320. Intrastate telephone calls are calls that originate and are received within the boundaries of a single state.

^k 47 U.S.C. § 227(d) and e(1); *see Report and Order*, 7 FCC Rcd at 8781.

^l 47 U.S.C. § 227(e)(1); *see Report and Order*, 7 FCC Rcd at 8781.

originate in Maryland and are received in another state.

In response to your second inquiry, the Commission stated that there are separate privacy concerns associated with artificial or prerecorded message solicitations as opposed to live solicitations, which include calls made by autodialers that deliver calls to live operators.^m The Commission did not consider adopting rules that would require telemarketers utilizing automated dialing systems to be on the telephone line and immediately ready to respond to customers at the time of a call. No provision regarding this concern is reflected in the language of the TCPA. In addition, no comments or petitions suggesting such a requirement were filed before the Commission during the rulemaking proceeding implementing the TCPA. Nothing in our rules, however, would limit the state of Maryland from including this type of provision in its telemarketing statutes applicable to calls between points in the state of Maryland.

In its *Report and Order*, the Commission considered a number of options that proposed to place a variety of requirements upon telemarketers, including requiring telemarketers to inform subscribers of their right to be placed on do-not-call lists. Although the Commission selected the establishment of company-specific do-not-call lists as the most effective alternative to protect residential subscribers from unwanted live solicitations, it did not require telemarketers to notify telephone subscribers of their right to be placed on do-not-call lists.ⁿ The Commission noted that it would disseminate public notices and work with consumer groups, industry associations, local telephone companies, and state agencies to ensure that consumers are fully informed of their rights under the TCPA. For example, the Commission released a public notice on January 11, 1993, a Consumer Alert in March 1995, and a Consumer News brochure in June 1997, explaining to consumers what actions they can take to reduce the number of unsolicited calls and facsimiles that they receive and detailing consumer rights under the TCPA and the Commission's rules. No additional petitions have been filed requesting that the Commission require telemarketing companies to inform consumers of their right to be placed on the companies' do-not-call lists.

Enclosed is a copy of a Consumer News bulletin addressing consumer rights under the TCPA; a copy of the *Report and Order*, *Memorandum Opinion and Order*,^o and *Order on Further Reconsideration*^p published by the Commission implementing the TCPA; a copy of 47

^m *Report and Order*, 7 FCC Rcd at 8756-57.

ⁿ *Report and Order*, 7 FCC Rcd at 8764-68.

^o Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd 12391 (1995) (*Memorandum Opinion and Order*).

^p Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Order on Further Reconsideration*, CC Docket 92-90, FCC 97-117 (rel. Apr. 10, 1997) (*Order*

C.F.R. § 64.1200, regulations implemented by the Commission regarding the TCPA; and a copy of the TCPA. If you have further questions, please contact Renee Alexander at (202) 418-2497.

Sincerely,

Geraldine A. Matisse
Chief, Network Services Division
Common Carrier Bureau

Federal Communications Commission Washington, D.C.
20554

March 3, 1998

Mr. Sanford L. Schenberg
P.O. Box 430010
Maplewood, Missouri 63143

Dear Mr. Schenberg:

I am writing in response to your December 16, 1997, facsimile requesting that the Commission describe its jurisdiction regarding Commission rules and interpret 47 U.S.C. ' 227 (c) (5) and (d) (3) of the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243. Specifically, you ask whether Commission regulations enacted pursuant to the TCPA apply to cases brought either before a court or within the Commission's complaint process.

On December 20, 1991, the U.S. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243, which amended the Communications Act of 1934^q by adding a new section 47 U.S.C. ' 227. The TCPA mandated that the Commission implement regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising. The Communications Act, and specifically section 227 of the Act, the TCPA, establishes Congress' intent to have the Commission regulate the use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or prerecorded messages. The TCPA also preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages.^r By its terms, the TCPA shall not "preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devices to send unsolicited

^q 47 U.S.C. ' ' 151 *et seq.* ("Communications Act" or "the Act").

^r 47 U.S.C. ' 227(d) and e(1); *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752, 8781 (1992) (*Report and Order*).

advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."^s

In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and Commission regulations, enacted pursuant to the TCPA, govern interstate commercial telemarketing calls in the United States.

Most importantly, the TCPA provides consumers with several options to enforce limitations against unsolicited telemarketing contacts. Absent state law to the contrary, the TCPA permits consumers to file suit in state court if an entity violates the TCPA prohibitions on the use of facsimile machines, automatic telephone dialing systems, and artificial or prerecorded voice messages and telephone solicitation. Consumers may also bring their complaints regarding TCPA violations to the attention of the state attorney general or an official designated by the state. This state entity may bring a civil action on behalf of its residents to enjoin a person or entity engaged in a pattern of telephone calls or other transmissions in violation of the TCPA. Additionally, a consumer may request that the Commission take enforcement actions regarding violations of TCPA and the regulations adopted to enforce it.

You ask whether the affirmative defense described in section 227(c)(5) applies to alternative sections of the TCPA. We note that this affirmative defense applies to violations of the subsection 227(c) and similarly to regulations prescribed by the Commission pursuant to subsection 227(c). It does not apply to alternative sections of the TCPA unless those sections include language describing such a defense.

In addition, you ask whether an individual can sue under section 227(d)(3) of the TCPA. Section 227(d) does not include a private right of action, thus an individual cannot sue in response to a violation of section 227(d)(3). An individual, however, can file a complaint with the Commission to enforce the regulations prescribed pursuant to section 227(d)(3) of the TCPA.

Last, you ask whether section 227(d)(3) applies to telephone calls made to businesses. The standards developed pursuant to section 227(d)(3) apply to all systems that transmit artificial or prerecorded messages via the telephone, and therefore cover calls made to businesses.

^s 47 U.S.C. ' 227(e)(1); *see Report and Order*, 7 FCC Rcd at 8781.

Please review previous information supplied to you in our reply to a July 17, 1997, letter written by Congressman Clay on your behalf.

Sincerely,

Geraldine A. Matisse
Chief, Network Services

Division

Common Carrier Bureau